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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN LIFE INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AMERICAN MUTUAL INSURANCE ALLIANCE, AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICI[1]

The four *amici* are associations whose collective membership constitute most of the major life, health, property and casualty

1. Pursuant to Supreme Court Rule No. 42(1), this brief is being filed along with written consents from all parties to this proceeding.

insurers in the nation.[2] Thus, the American Life Insurance Association and Health Insurance Association of America represent approximately 500 life and health insurance companies, accounting for about 92 percent of the total life insurance in force in the United States, 90 percent of the total health insurance written by insurance companies, and over 99 percent of the assets of insured pension plans. Similarly, the National Association of Independent Insurers has 411 member companies, while American Mutual Insurance Alliance has approximately 100 member companies, all engaged in the property and casualty insurance business. In addition to being interested as insurers to the Court's consideration of the important question involved herein, the amici' membership, which collectively employ well over one million persons, are also vitally affected as employers in the outcome of this case.

The decision of the lower court—announcing for the first time by a United States Court of Appeals that an employer may not exclude coverage for pregnancy from the risks covered by its employee disability income program when the plan covers most disabilities attributable to sickness and accident—severely undermines the flexibility of employers in tailoring their benefit plans to achieve the broadest coverage at lowest cost for all employees. Moreover, the Court of Appeals' endorsement[3] of the EEOC's guideline[4]—apparently promulgated by the Commission, oblivious to its significance, that "the cost of such benefits" is *not* a permissible consideration, obliterates the basis upon which objective, nondiscriminatory benefit coverage decisions are made by employers. Finally, in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), this Court held that a public insurer could decline

2. Liberty Mutual Insurance Company is a member of the American Mutual Insurance Alliance and the Health Insurance Association of America, but is not a member of the National Association of Independent Insurers. Liberty Life Assurance Company of Boston, a subsidiary of Petitioner, is a member of the American Life Insurance Association.

3. Pet. App. p. 14.

4. 29 C. F. R. § 1604.9(e).

coverage for pregnancy under its public disability income plan on the grounds that such risk selection was permissible in the absence of a pretextual attempt to discriminate on the basis of sex. The *amici* believe that private employers should similarly be able to objectively allocate risk selection in the same fashion; in the absence of a showing that such risk selection is not objectively based, e.g., that it is designed to discriminate against women, it is permissible.

REASONS FOR GRANTING THE WRIT

In *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) this Court sustained the constitutionality of the State of California's exclusion of coverage for disabilities incident to pregnancy from its public disability insurance program. In so ruling, the Court concluded that the exclusion was not discriminatory and was in accord with proper insurance concepts:

> "It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts."[5]

Deference to insurance concepts was, of course, not deemed absolute; but "absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination"[6] the exclusion was deemed lawful. The *amici* respectfully submit that a private employer in the statutory context should be treated no differently: An employee benefit plan which nondiscriminatorily excludes pregnancy coverage due to objective cost considerations, is based upon a legitimate, rather than discriminatory, business practice.

1. The decision of the lower court severely undermines the flexibility of employers to provide coverage for their employees based upon objective assessment of the liability projected for the risks covered and a desire to achieve maximum

5. *Aiello*, 417 U. S. at 492 (footnote omitted).

6. *Id.* at 496, n. 20.

risk coverage by declining to include certain high cost risks. Several factors demonstrate that the exclusion of coverage for pregnancy related disabilities are objectively based, and, moreover, that the nature of the risk involved is of such a totally different order than covered risks, so as to render its different treatment not discriminatory.

First is *cost*: pregnancy contemplates a minimum six week period of disability, usually from three weeks before delivery to three weeks after.[7] The exclusion of coverage for pregnancy is, accordingly, a significant cost based factor. The E. E. O. C.'s guideline, however, that cost may *not* be a legitimate factor in benefit coverage [29 CFR § 1604.9(e)], which was endorsed by the Court of Appeals,[8] radically, but unjustifiedly, undermines this traditional coverage criterion and thus warrants review by this Court.

Second, the *character* of the risk is fundamentally different from sickness and accident related disabilities in that, in this day and age, most pregnancies are voluntarily contracted,[9] in contrast to sickness and accidents which are involuntarily contracted. The lower court's glossing over this critical distinction with the observation that "there are a great many activities that people participate in that involve a recognized risk . . . drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm" (Pet. App. p. A12)—is specious. For it is the role of insurance to provide protection for contingent risks which may occur from participation in such activities, *not* to subsidize activities voluntarily entered into with knowledge, and indeed the *intent* to incur

7. Moreover, this period is subject to extension, and consequently increased cost, due to post delivery sensitivity which is not capable of evaluation due to psychological overtones frequently involved.

8. The Court of Appeals, uncritically accepting the E. E. O. C.'s guideline, stated "[w]e agree that cost is no defense under Title VII to this particular issue." (Pet. App. p. A14)

9. See *Newmon* v. *Delta Air Lines Co.*, 374 F. Supp. 238 (N. D. Ga. 1974).

the disability sought to be covered. In such instances, the proceeds of the insurance are not for a contingent unwanted risk, but rather is a *subsidy* for a usually planned result.

Third, given the purpose of private disability coverage to tide employees over until their return to work, that purpose is not served by providing coverage for pregnancy, inasmuch as employees, more often than not, do not return to work after delivery.[10] In such circumstances, pregnancy benefits become not a form of insurance, but rather, a unique form of severance pay.

Coverage for pregnancy, therefore—apart from the objective considerations of cost—is of *totally different order* than sickness and accident insurance coverage, and refusal to provide coverage for it, therefore, cannot be deemed discrimination in enjoyment of benefits. That fact, together with the destructive impact that the Court of Appeals' decision has on heretofore accepted employers' flexibility in providing disability insurance, compels review by this Court.

2. The position of the E. E. O. C., advanced to the Court of Appeals, demonstrates the critical need for this Court to provide standards for determining whether disability insurance benefit availability violates Title VII of the Civil Rights Act of 1964, as amended. Before that Court, the E. E. O. C. urged:[11]

> If an insurance policy covered every disability except that arising from hemophilia, a disease with particularly high incidence among men, such a policy, although neutral on its face, would result in disparate treatment of men. Whether that policy could or could not be justified on the basis of other considerations would be a matter to be determined under appropriate standards.

10. It was Petitioner's experience, for instance, that almost 80 percent of its employees who became pregnant, never returned to work at the Company. (Appendix annexed to Appellant's Brief to the Court of Appeals.)

11. Brief for the E. E. O. C. as *amicus curiae*, p. 13 (3rd Cir., No. 74-1233).

Nowhere, however, does the Agency explain or indicate what those "appropriate standards" would be. Thus, its analysis is particularly shocking, because the *amici* are unaware of any disease whose incidence is precisely the same among both sexes. Apparently, under the Commission's view, it may be unlawful to exclude coverage for any disability from a comprehensive disability insurance program unless the rate of affliction is the *same* for each sex. This view, it is submitted, is preposterous; at a minimum it explodes beyond recognition the congressional purpose of removing institutionalized barriers to employment opportunities for females.[12] The Commission's untenable position demonstrates the clear need for this Court to develop those "appropriate standards" in this case.

3. The foregoing demonstrates that the premise implicit in the Commission's guideline—that pregnancy is the same as all other disabilities—is unfounded, and that its exclusion therefore cannot be deemed benefit discrimination. But even assuming, *arguendo*, the validity of that premise, the exclusion of pregnancy from coverage does not constitute *sex* discrimination within the meaning of Title VII. For here, as in *Aiello*,[13] "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." That finding remains the same in the statutory context involved herein, as well as in the constitutional context involved in *Aiello;* the conclusion that obtained in *Aiello*, it is submitted, can therefore be no different in this case. However, due to the divisiveness this very question has generated in the federal judiciary (see Petition, pp. 10-11), the *amici* urge the Court to utilize this case to settle the issue with finality.

Moreover, as the Second Circuit has only recently recognized, the E. E. O. C.'s pregnancy benefit guidelines are inescapably inconsistent with this Court's decision in *Aiello* (417 U. S. 496,

12. See *Phillips* v. *Martin-Marietta Co.*, 400 U. S. 542, 544 (1971).

13. 417 U. S. at 496; and *Id.* n. 20.

n. 20), a conclusion which that Court found to be "inconceivable."[14] This troublesome question is, therefore, one which only this Court can, and should, resolve.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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14. *Communications Workers of America* v. *American Telephone and Telegraph Co.*, ... F. 2d ....., ... FEP Cases ..... (2nd Cir., No. 74-2191, March 26, 1975).